

**SOAH DOCKET NO. 582-22-07138  
TCEQ DOCKET NO. 2022-0532-DIS**

<b>PETITION FOR THE CREATION OF HIGHLAND LAKES MUNICIPAL UTILITY DISTRICT NO. 1 OF ELLIS COUNTY</b>	<b>§ § § §</b>	<b>BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS</b>
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**HIGHLAND LAKES MIDLOTHIAN I, LLC’S REPLY TO EXCEPTIONS TO THE  
PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Highland Lakes Midlothian I, LLC, the Applicant for creation of Highland Lakes Municipal Utility District No. 1 of Ellis County (the “MUD”), Replies to the City of Waxahachie (“Waxahachie”), the City of Midlothian (“Midlothian”) and Ellis County’s (“County”) (collectively “Protestants”) Exceptions to the Proposal for Decision (“PFD”). Accordingly, Applicant shows the following:

**I. INTRODUCTION**

Approval of the MUD’s creation does not exempt the land to be included in the district from any other regulatory requirements. Rather, a petition for MUD creation simply draws a boundary around the landowner’s property that will be included in the district and operates as a financing tool for that that district. In considering the MUD’s creation, the following applies:

- (a) If the commission finds that the petition conforms to the requirements of Section 54.015 and that the project is feasible and practicable and is necessary and would be a benefit to the land to be included in the district, the commission *shall* so find by its order and grant the petition.
- (b) In determining if the project is feasible and practicable and if it is necessary and would be a benefit to the land included in the district, the commission shall consider:
  - (1) the availability of comparable service from other systems, including but not limited to water districts, municipalities, and regional authorities;
  - (2) the reasonableness of projected construction costs, tax rates, and water and sewer rates; and

- (3) whether or not the district and its system and subsequent development within the district will have an *unreasonable effect* on the following:
- (A) land elevation;
  - (B) subsidence;
  - (C) groundwater level within the region;
  - (D) recharge capability of a groundwater source;
  - (E) natural run-off rates and drainage;
  - (F) water quality; and
  - (G) total tax assessments on all land located within a district.<sup>1</sup>

As set forth above, in determining if a project is feasible, practicable, and necessary and would be a benefit to the land to be included in the district, the TCEQ need only *consider* whether the MUD will have an *unreasonable* effect on the identified seven factors. The TCEQ considered these seven factors. In reviewing the MUD's creation application, the PFD recommends that the project is feasible and practicable and is necessary and would be a benefit to the land to be included in the district with respect to all but two these factors.<sup>2</sup> Specifically, no unreasonable effects were identified with respect to land elevation or subsidence<sup>3</sup>, recharge capability of a groundwater source<sup>4</sup>, natural run-off rates and drainage<sup>5</sup>, water quality (with the exception of stormwater runoff)<sup>6</sup>, and total tax assessments on all land located within a district<sup>7</sup>. The PFD also determined that all requirements were met regarding a request for service<sup>8</sup>, comparable service in the area<sup>9</sup>,

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<sup>1</sup> TEX. WATER CODE ("TWC") § 54.021 (emphasis added).

<sup>2</sup> See Proposal for Decision at 55 (determining that the Applicant met all requirements for MUD creation, excluding with respect to its effect on stormwater runoff and groundwater levels in the region).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at pp. 29–33.

<sup>5</sup> *Id.* at pp. 33–37.

<sup>6</sup> *Id.* at pp. 37–42.

<sup>7</sup> Proposal for Decision at pp. 42–44.

<sup>8</sup> *Id.* at pp. 12–16.

<sup>9</sup> *Id.* at pp. 16–21.

and that the Petition was signed by a landowner with a majority in value over 50% of the proposed MUD.<sup>10</sup>

The PFD recommendations that are unfavorable to the Applicant were based merely on findings of insufficient evidence that the District will not have an unreasonable effect on water quality due to stormwater runoff and on groundwater levels in the region.<sup>11</sup> Applicant and the ED have pointed to sufficient evidence in their Exceptions to the PFD to resolve those concerns and urges that the Commission approve the MUD despite the PFD's recommendation to the contrary.<sup>12</sup>

The Commission's consideration of approval or denial of a MUD is based on a review of the application at the time of its submittal and as supplemented by the administrative evidentiary record. The TCEQ is not charged with issuing permits during its review of MUD creation matters with regard to any of these MUD creation factors, nor should a proposed MUD be subject to any higher regulatory standard than any other development. Therefore, the proposed MUD meets the statutory requirements of creation and should be granted.

## **II. APPLICANT'S REPLY TO PROTESTANTS' EXCEPTIONS TO THE PFD**

On July 19, 2023, Protestants filed their Exceptions to the PFD.<sup>13</sup> Specifically, Protestants maintain that Applicant did not meet its burden of proving that the MUD's creation meets requirements pertaining to (A) water quality; (B) groundwater levels; (C) the requirement that applicants submit a request for service; (D) whether the MUD would be a benefit to the land

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<sup>10</sup> *Id.* at pp. 47–49.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; *see generally* Applicant's Exceptions to Proposal for Decision; *see also* Executive Director's Exceptions to the Proposal for Decision.

<sup>13</sup> *See generally* Protestants' Exceptions to Proposal for Decision (July 19, 2023) (*hereinafter* "Protestants' Exceptions").

included in the MUD; (E) a failure to prove the petitions were signed by a majority in value of landowners; and (F) did not properly request road powers.

**A. The MUD’s creation will not have an unreasonable effect on water quality.**

“The lack of local rules regarding stormwater quality should not invalidate the [MUD] creation application and the Executive Director’s review of the proposed district.”<sup>14</sup> Moreover, according to the TCEQ Executive Director’s (“ED”) testimony, Approval of the MUD “is consistent with previous District creation applications,”<sup>15</sup> and “[t]o require the ED to verify whether local authorities have stormwater rules, and then require additional analysis from Applicants, falls outside of the TCEQ rules on [MUD] creations.”<sup>16</sup> The ED also notes that the applicant is subject to Texas Pollutant Discharge Elimination System (“TPDES”) permitting requirements.<sup>17</sup> The development *cannot* have an *unreasonable* effect on water quality, because the MUD will adhere to all applicable federal, state, and local rules and regulations such as these local Storm Water Management programs. Here, too, the Applicant agrees with the ED: the evidentiary record shows that the MUD will not have an unreasonable effect on water quality, and the existence of other water quality regulatory programs, including those implemented by Protestants, further justifies approval of this MUD.<sup>18</sup>

Additionally, the proposed development is typical and similar to others in the area that are routinely approved by both cities, and the project is without any identifiable features or challenges that will require waivers to any rules or regulations or require special consideration.<sup>19</sup> Therefore,

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<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.* at 55

<sup>16</sup> *Id.*

<sup>17</sup> ED’s Exceptions at pp. 2–3.

<sup>18</sup> ED’s Exceptions at pp. 1–3.

<sup>19</sup> Direct Testimony of Paul McCracken, Applicant Ex. 18 at pp. 4–5; 14.

Applicant has met its burden and the evidentiary record clearly shows that the proposed development will not have an *unreasonable* effect on water quality.

**B. The MUD's creation will not have an unreasonable effect on groundwater levels.**

“[T]he evidence in the record does not show that groundwater levels will be negatively impacted by the creation of the [MUD].”<sup>20</sup> As is clear, the MUD will be served by Mountain Peak or Buena Vista Special Utility District (“SUD”). Mountain Peak SUD plans to use primarily surface water for its service. However, the TCEQ Office of Public Interest Counsel (“OPIC”) even argues that Mountain Peak Special Utility District’s (“SUD”) or Buena Vista SUD’s use of groundwater is not part of the ED’s review and that these entities can utilize groundwater irrespective of the MUD creation process.<sup>21</sup> The ED’s memo for this MUD creation did not identify any characteristics that will cause or contribute to adverse impacts of groundwater levels and recharge capability.<sup>22</sup> Any groundwater withdrawals to serve the MUD are subject to the legislatively created Prairielands Groundwater Conservation District’s oversight and permits, which means the MUD cannot unreasonably affect the groundwater levels in the region. In addition, the proposed development is a typical multi-phase development consisting of predominantly single-family residential uses and, as such, will not have any greater effect on groundwater levels in the region than any other typical single-family development.<sup>23</sup> Consequently, the District’s systems and the proposed development will not have an unreasonable effect on groundwater levels or recharge in the region.<sup>24</sup>

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<sup>20</sup> ED’s Exceptions at 2.

<sup>21</sup> *Id.*

<sup>22</sup> See Executive Director Exhibit ED-JW-3, Technical Memorandum for Highland Lakes MUD No. 1 of Ellis County at pp. 23, 29.

<sup>23</sup> ED’s Exceptions at 2.

<sup>24</sup> *Id.*; see also Prefiled Direct Testimony of the Executive Director of the TCEQ at pp. 7; 10–12.

**C. Applicant has properly requested water and wastewater service.**

The PFD determined that the Applicant properly requested service and Protestants' arguments to the contrary were not persuasive. In effect, the Protestants incorrectly claim that all applicants seeking to create a MUD must submit information that is not required by the rules and statutes applicable to MUD creations. The record clearly shows that Applicant met its burden in proving compliance with Texas Water Code § 54.234 and 30 Texas Administrative Code §§ 293.11(d)(11) and 293.202.<sup>25</sup> It is without question that Applicant met its burden relating to the availability of comparable service in the area.<sup>26</sup> The Cities have refused to serve the Applicant or are unable to provide service.<sup>27</sup> Applicant did not “unreasonably refuse to enter into a contract for water or sanitary sewer services” because no such contract was ever offered by the Cities.<sup>28</sup>

The Cities never requested additional information during the 120-day period allowed by statute for the parties to come to terms on a mutually agreeable contract.<sup>29</sup> Protestants' further undermine their own argument by admitting in their very own exceptions to the PFD that Waxahachie “does not have currently existing infrastructure to serve the development” and that such infrastructure would need to be constructed to serve the MUD.<sup>30</sup>

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<sup>25</sup> See Executive Director Exhibit ED-JW-3, Technical Memorandum for Highland Lakes MUD No. 1 of Ellis County at 12; *see also* Applicant Exhibit Nos. 8, 9, and 10 (*respectively*, Petition for the Creation of Highland Lakes MUD No. 1 of Ellis County, signed by Shannon Livingston dated July 23, 2021); Letters dated July 29, 2021, Transmitting Petition for the Creation of Highland Lakes MUD No. 1 of Ellis County dated July 23, 2021; and Amended Petition for the Creation of Highland Lakes MUD No. 1 of Ellis County, signed by Shannon Livingston, dated November 19, 2021).

<sup>26</sup> Proposal for Decision at pp. 16–21.

<sup>27</sup> Tr. at pp.115–125 (Cross-Examination of Christopher Dick); *see generally* Direct Testimony of Michael Scott.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at pp. 15–16.

<sup>30</sup> See Protestants' Exceptions at pp. 3–4.

**D. The MUD will be a benefit to the land to be included in the district.**

The Applicant has met its burden in proving compliance with Texas Administrative Code section 293.11(c)(5)(J). Specifically, the Applicant's evidence shows that the project will benefit all of the land to be included in the District.<sup>31</sup> There have been several thousand MUDs created in the State of Texas over the past 60 years. MUDs are created because they provide for low interest, long-term, fixed-rate, tax-exempt financing of public infrastructure such as water, sewer, drainage, and roads.<sup>32</sup> In addition, MUDs provide for the ownership, operation, and maintenance of the above-described public infrastructure. The Applicant cannot undertake the expense to create a MUD if it did not provide a benefit to the property.<sup>33</sup> The infrastructure proposed to be constructed and financed by the District is the basic and typical infrastructure needed to serve the predominantly single-family project. Creation of the District and the proposed development within it are occurring in one of the best single-family markets in the United States.<sup>34</sup> Creation of the District will allow the Applicant to utilize the lowest cost financing tool to deliver lots and homes at the lowest possible price to homeowners. Other competing developments have available the use of financing tools like the District, which will allow access to the lowest financing costs. In absence of the District, the Applicant will be unable to compete with other developments, which will cause severe damage to the value of its land. In summary, the creation of the District is critical. *See* Livingston Direct Testimony.

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<sup>31</sup> *See* 30 TEX. ADMIN. CODE § 293.11(d)(5)(J).

<sup>32</sup> *See* Applicant Exhibit No. 17, Shannon Livingston Direct Testimony.

<sup>33</sup> *See id.*

<sup>34</sup> *See* Applicant Exhibit 23, District Creation Market Study; *see also* Applicant Exhibit No. 21, Cassie Gibson Direct Testimony.

**E. The Petition was signed by a majority in value of landowners.**

The preponderance of the evidence demonstrates that the Applicant is the holder of title to majority in value of land to be included within the proposed District.<sup>35</sup> The Applicant's Petition recites that the Applicant owns well over 50% of the land in the applicable District. The Applicant's sworn testimony confirms such ownership.<sup>36</sup>

**F. Applicant properly requested road powers.**

The Applicant has met its burden in proving compliance with Texas Water Code section 54.234 and 30 Texas Administrative Code sections 293.11(d)(11) and 293.202.<sup>37</sup> The petition to the TCEQ requests that the TCEQ grant the District authority to provide for roads.<sup>38</sup> The project also complies with Texas Water Code § 54.016. The Applicant has provided a preliminary layout as to the known roads (*i.e.*, major thoroughfares), and met its financial and economic feasibility requirements.

**III. APPLICANT'S RESPONSE TO THE ED'S EXCEPTIONS TO THE PFD**

On July 19, 2023, the ED of the TCEQ filed its Exceptions to the PFD.<sup>39</sup> In its exceptions, the ED recommends that the Commission approve the Applicant's petition to create Highland Lakes Municipal Utility District No. 1 of Ellis County despite the PFD's recommendation to the contrary. In its Exceptions, the ED addresses two factors that contributed towards the administrative law judge's ("ALJ") denial of the Applicant's petition to create a MUD Applicant:

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<sup>35</sup> Proposal for Decision at pp. 47–49.

<sup>36</sup> *See generally* Applicant Exhibit No. 8; *see also* Applicant Exhibit No. 10 at Paragraph IV; *see also* Applicant Exhibit No. 16, Prefiled Direct Testimony of Shannon Livingston at pp. 2, ll. 11–22.

<sup>37</sup> *See* Applicant Exhibit Nos. 8, 9, and 10; *see also* ED Exhibit ED-JW-3, Technical Memorandum for Highland Lakes MUD No. 1 of Ellis County at 12.

<sup>38</sup> *Id.*

<sup>39</sup> *See generally* Executive Director's Exceptions to the Proposal for Decision, Executive Director of the Texas Commission on Environmental Quality (July 19, 2023) (*hereinafter* "ED's Exceptions").



(1) the MUD's effect on water quality in the region due to stormwater runoff; and (2) the MUD's effect on groundwater levels in the region. The Applicant agrees with the ED's Exceptions in their entirety.

The ED properly recommends that the Applicant's petition to create a MUD be approved because "[t]he lack of local rules regarding stormwater quality should not invalidate the [MUD] creation application and the Executive Director's review of the proposed district."<sup>40</sup> The ED notes in its exceptions that approval of Highland Lakes MUD No. 1 "is consistent with previous District creation applications."<sup>41</sup> The ED further states that "[t]o require the ED to verify whether local authorities have stormwater rules, and then require additional analysis from Applicants, falls outside of the TCEQ rules on [MUD] creations."<sup>42</sup> Finally, the ED notes that the Applicant is subject to Texas Pollutant Discharge Elimination System ("TPDES") permitting requirements as well.<sup>43</sup> Again, the Applicant agrees with the ED. The evidentiary record illustrates that the MUD will not have an *unreasonable* effect on water quality in the region, and the existence of other water quality regulatory programs further justifies approval of this MUD.

The ED also properly recommends that the Applicant's petition to create a MUD be approved because "the evidence in the record does not show that groundwater levels will be negatively impacted by the creation of the [MUD]."<sup>44</sup> The ED further notes that the TCEQ Office of Public Interest Counsel ("OPIC") also concluded in their closing arguments that Mountain Peak Special Utility District's ("SUD") or Buena Vista SUD's use of groundwater is not part of the

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<sup>40</sup> *Id.* at 3.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> ED's Exceptions at 2–3.

<sup>44</sup> ED's Exceptions at 2.

ED's review and that these entities can utilize groundwater irrespective of the MUD creation process.<sup>45</sup> The ED further notes that the ED's memo for this MUD creation petition determined that the proposed development did not have any characteristics "that will cause or contribute to adverse impacts of groundwater levels and recharge capability."<sup>46</sup> The Applicant agrees. The evidentiary record shows that the MUD will not have an *unreasonable* effect on groundwater levels in the region and, therefore, should be approved despite the PFD's recommendation to the contrary.

The ED also concludes by noting that by denying the MUD and following the ALJ's alternative recommendation, the Commission would "create a new factor for MUD Creations that would require applicants to verify whether local jurisdictions have rules for stormwater quality, and if not, then provide additional analyses to the TCEQ with their creation application."<sup>47</sup> The ED argues that this would result in the need for "additional staff resources to evaluate the existence of local rules and perform additional analyses regarding stormwater quality."<sup>48</sup>

The Applicant shares the ED's concern that following the PFD's recommendation would result in the Commission acting outside the scope of what the MUD creation statutes and rules require and would place an unnecessary regulatory burden on Staff—and future MUD creation Applicants. For these reasons, Applicant respectfully urges that the Commission approve the creation of Highland Lakes MUD No. 1. of Ellis County.

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

#### **IV. CONCLUSION AND PRAYER**

WHEREFORE, the Applicant respectfully requests that the Commission overrule Protestants' Exceptions to the PFD, and that the application to create Highland Lakes MUD No. 1 be approved as requested by the Applicant, the ED, and OPIC.

Respectfully submitted,

**COATS | ROSE**

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 28, 2023, a copy of the foregoing Pleading was served on all person listed either via hand delivery, facsimile transmission, electronic mail, and/or by deposit in the U.S. Mail.

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